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No. 167

In the Supreme Court of the United States

OCTOBER TERM, 1951

BOYCE MOTOR LINES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 24-29) is reported at 188 F. 2d 889.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1951 (R. 30). On May 25, 1951, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Burton to and including July 2, 1951 (R. 32), and the petition was filed on that date. The jurisdiction of

this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

By regulation of the Interstate Commerce Commission, drivers of motor vehicles transporting, *inter alia*, any explosive or inflammable liquid, are required "to avoid, so far as practicable and, where feasible, by prearrangement of routes," driving through "congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings." By 18 U.S.C. 835, whoever "knowingly" violates such regulation is punishable. The question presented is whether an ascertainable standard of guilt is prescribed within the requirements of the Fifth and Sixth Amendments to the Constitution.

STATUTE AND REGULATION INVOLVED

18 U.S.C. 835:

> The Interstate Commerce Commission shall formulate regulations for the safe transportation within the limits of the jurisdiction of the United States of explosives and other dangerous articles, including flammable liquids, flammable solids, oxidizing materials, corrosive liquids, compressed gases, and poisonous substances, which shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives or other dangerous articles by land, and upon all shippers making shipments of explosives or other dangerous articles via any common car-

rier engaged in interstate or foreign commerce by land or water.

* * * * * *

Whoever knowingly violates any such regulation shall be fined not more than $1,000 or imprisoned not more than one year, or both; and, if the death or bodily injury of any person results from such violation, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

49 C F R (1949 Ed.) § 197.1 (b):

Drivers of motor vehicles transporting any explosive, inflammable liquid, inflammable compressed gas, or poisonous gas shall avoid, so far as practicable, and, where feasible, by prearrangement of routes, driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings.

STATEMENT

In an indictment returned by a grand jury for the District of New Jersey, petitioner was charged, in the three counts here in question (counts 1, 3, and 5, R. 2-3, 4-5, 6-7), with having "unlawfully and knowingly" caused its driver, en route from Cascade Mills, New York, to Brooklyn, New York, to drive a truck containing an inflammable liquid, carbon bisulphide, "into the Holland Tunnel, a congested thoroughfare." The dates of the offenses were charged as on or about April 7, April 8, and May 13, 1949, respectively, and it was further

charged that "there were other available and more practicable routes" and that petitioner "well knew that the transportation * * * into the said Holland Tunnel was in violation of the regulations." Count 1 also charged that on May 13, carbon bisulphide, of a gross weight of 48,536 pounds, flamed and exploded in the Holland Tunnel and that as a result of petitioner's violation bodily injuries were caused to approximately 60 persons.

The District Court dismissed the three counts (R. 17) on the ground that the regulation did not fix an ascertainable standard of guilt (R. 10-11). He found that intent was not made an element of the offense (R. 13). The Court of Appeals for the Third Circuit, in a unanimous decision, reversed the order of the District Court (R. 30), holding that the regulation, read with the statute, requires a wrongful intent to evade the regulation (R. 26) and that, so construed, the regulation establishes a standard of guilt that is reasonably certain (R. 27-28).[1]

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[1] The counts here in question and the additional counts 2, 4, and 6, further charged operations without signs, marks, or placards on the vehicle, as required under Interstate Commerce Commission regulations in the case of dangerous shipments. The District Court found counts 1, 3, and 5 ambiguous by reason of the inclusion of charges as to the lack of markings (R. 14), but the Court of Appeals found that the additional charges constituted only surplusage of a non-prejudicial nature (R. 28-29). This matter is not raised in the petition for a writ of certiorari (see Pet. 5-6). Petitioner moved in the District Court for dismissal of counts 2, 4 and 6, which charged operations without the required markings. The District Court found the contention of ambiguity without merit as to these counts and denied the motion to dismiss as to them (R. 15).

To support its contention that the regulation here in question affords no ascertainable standard of guilt, petitioner sets forth the possible difficulty in determining the least dangerous route for shipment of explosives and argues its point on the assumption that it has been indicted for an honest error of judgment. Such, however, is not the case.

The statute punishes any one who "knowingly" violates the regulation, and the indictment alleges that petitioner caused its driver to use a congested thoroughfare when there were other available, practicable routes, well knowing that the route it selected was in violation of the regulation. Thus, in essence, the statute punishes, and the indictment charges, not a mere honest error of judgment, but a wilful failure to consider the factor of safety in selecting a route.

Thus understood, it becomes clear that the regulation in question fixes a standard of guilt sufficient to meet constitutional requirements. The difficulties set forth by petitioner are no greater than those commonly involved in complying with a number of criminal statutes that have been upheld in decisions of this Court, the Court pointing out that requirements of compliance that are perhaps vague in their literal terms are to be tested by proper reference to the common usage and understanding to which the requirements relate.[2] In

[2] *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U.S. 86, 108-111 (contracts and arrangements "reasonably calculated" to fix

Omaechevarria v. *Idaho*, 246 U.S. 343, 348; *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503; *United States* v. *Ragen*, 314 U.S. 513, 524; and *Screws* v. *United States*, 325 U.S. 91, 101-103 (*supra*, fn. 2), this Court has further pointed out that, since it is necessary to a conviction that there be a guilty state of mind as well as the intent to do

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prices, and acts which "tend" to accomplish the prohibited results); *Nash* v. *United States*, 229 U. S. 373, 376-378 (conspiracy in restraint of trade and to monopolize trade); *Miller* v. *Strahl*, 239 U.S. 426, 434 (hotel keepers required, in case of fire, to "do all in their power to save such guests"); *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348 (grazing sheep "upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle"); *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 501-503 (selling meat upon false representation that it is "kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements"); *United States* v. *Alford*, 274 U.S. 264, 267 (building a fire "near" forest or inflammable material upon the public domain); *Bandini Co.* v. *Superior Court*, 284 U.S. 8, 17-18 (an "unreasonable waste" of gas where it "has been allowed to come to the surface without its lifting power having been utilized to produce the greatest quantity of oil in proportion"); *Sproles* v. *Binford*, 286 U.S. 374, 392-393 ("nearest practicable common carrier receiving or loading point", by "shortest practicable route," and "point equipped to transport such load"); *United States* v. *Ragen*, 314 U.S. 513, 522-524 ("reasonable" allowance for salaries in determining question of willful evasion of tax); *Screws* v. *United States*, 325 U.S. 91, 101-103 ("willfully" depriving any person "under color of any law" of "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States"); and *United States* v. *Petrillo*, 332 U.S. 1, 6-8 (forcing employment of persons at a broadcasting station "in excess of the number * * * needed by such licensee to perform actual services"). And see citations applied by analogy in deportation for "moral turpitude." *Jordan* v. *De George*, 341 U.S. 223, 231, fn. 15. Cf. the earlier decisions relied upon by petitioner, *Connally* v. *General Construction Co.*, 269 U.S. 385 (requirement of payment of wages at the "current rate of per diem wages in the locality"), and *United States* v. *Cohen Grocery Co.*, 255 U.S. 81 ("unjust or unreasonable rate or charge in handling or dealing in or with any necessaries").

the specific act, no offender would be without warning of the criminality of his act and no offender would be convicted upon a mere honest error of judgment.[3]

We do not suggest that "knowingly" as used in 18 U.S. Code 835 should always be construed to require something more than an intent to do an act which is prohibited by the Commission's regulations for the transportation of explosives. For example, since compliance with the Commission's regulations as to smoking, fireproof bulkheads, and electric lights (49 C.F.R. 197.1(e), 197.2(b) and (f)) would involve no exercise of judgment, one "knowingly violates" such regulations merely by deliberately engaging in the prohibited conduct. However, where compliance with the regulation involved requires the exercise of a reasonable judgment upon complicated facts, "knowingly" inherently means a specific criminal intent or at least such a reckless disregard of consequences as will enable prosecutors and courts to distinguish honest mistakes in judgment from criminal conduct.

18 U.S.C. 835 constitutes a mandate that "[t]he Interstate Commerce Commission shall formulate regulations for the safe transportation * * * of explosives and other dangerous articles, includ-

[3] Where a difficult determination is required in order to ascertain what will constitute compliance, this Court has repeatedly held that a guilty state of mind is required as an element of the crime. *Felton* v. *United States*, 96 U.S. 699, 703; *Potter* v. *United States*, 155 U.S. 438, 446; *United States* v. *Murdock*, 290 U.S. 389, 396.

ing flammable liquids * * *." It is manifest that the Commission cannot prescribe the specific route for each dangerous shipment in the United States. Moreover, if the Commission could prescribe such routes it still could not prevent a shift of the public from other routes to the routes designated for dangerous traffic. The inability to prescribe a standard with absolute mathematical precision does not, however, permit the Commission to abdicate its function.

What the Commission has required is an honest effort to avoid the use of congested thoroughfares "so far as practicable, and, where feasible." In most cases, as pointed out by the Court of Appeals (R. 28), this will not involve a difficult determination, for the choice between routes will not be close. But even if choice is difficult, there cannot be a complete absolution from the duty to make a reasonable choice. An area of difficult choice cannot justify a choice dictated solely by considerations of speed or profit and in total disregard of safety.

Petitioner in effect asks this Court to take judicial notice, without evidence, of a conclusion that the New York area admits of no choice of thoroughfares. That argument does not tend to show that the regulation is indefinite. All it would prove is that the decision required by the regulation has been honestly made. If petitioner's contention in this respect were valid, it would have a defense which it should prove before a jury upon the basis

of evidence, rather than as an alleged matter of common knowledge or judicial notice.[4]

CONCLUSION

The judgment below is correct and no conflict of decisions is presented. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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[4] Petitioner argues, for example (Pet. 7), as if the viaducts of the George Washington bridge would constitute the only alternative to the tunnel in which the explosion took place. But if the matter is to be tried upon mere allegations of purported common knowledge, this Court could as properly take judicial notice that the D.L. & W. railroad operated a special explosives ferry from Hoboken, New Jersey, to New York City (See I.C.C. No. 3681, Ferry Tariff, No. 15, D.L. & W. R.R. Co., between New York, N.Y. and Hoboken, N.J., effective May 27, 1939 to September 1, 1949). Before petitioner's argument against use of the bridge is accepted as decisive of the matter, the availability of the ferry and of possible other alternative routes would require full presentation in evidence.

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